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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 520

JOSE MARIA GASTELUM-QUINONES, PETITIONER

v.

ROBERT F. KENNEDY, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. A) is not reported. The prior opinion of the court of appeals (Pet. App. B, pp. 2-10) is reported at 286 F. 2d 824, certiorari denied, 365 U.S. 871.

JURISDICTION

The judgment of the court of appeals was entered on September 13, 1961 (Pet. App. A). The petition

for a writ of certiorari was filed October 27, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner should be permitted to challenge again the administrative finding that he was deportable as an alien who, after entry, had become a member of the Communist Party where, on a previous reopening of the deportation proceedings, petitioner had submitted no evidence to contradict the government's proof that he had been a "meaningful" member, and where he has had full judicial review of that factual determination.

STATUTE INVOLVED

Section 241 of the Immigration and Nationality Act of 1952 (8 U.S.C. 1251) provides in pertinent part:

> (a) General classes.
>
> Any alien in the United States * * * shall, upon the order of the Attorney General, be deported who—
>
> * * * *
>
> (6) is or at any time has been after entry, a member of any of the following classes of aliens:
>
> * * * *
>
> (C) Aliens who are members of or affiliated with (i) the Communist Party of the United States; * * *
>
> * * * *

STATEMENT

This is the second round of judicial review instituted by petitioner, a native and national of Mexico, from an order directing his deportation on the ground that he is an alien who, after entry into the United States, had become a member of the Communist Party within the meaning of Section 241(a)(6)(C) of the Immigration and Nationality Act of 1952, *supra*, p. 2. The pertinent facts may be summarized as follows:

A. The original proceedings.[1]

1. On February 28, 1957, following a hearing, petitioner was ordered deported by a special inquiry officer on the ground that, after entry into the United States, he had been a voluntary member of a least two units of the Communist Party. This finding was based on the testimony of two former members of the Communist Party that petitioner had attended closed meetings of small units of the Party from 1949 through 1951; that he had paid Party dues; and that he had attended a Communist Party convention at which members were screened before they were permitted to enter. Petitioner declined to testify at the hearing. On November 14, 1957, an appeal from the order of deportation was dismissed by the Board of Immigration Appeals.

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[1] A detailed summary of these proceedings and of the facts is set forth in the government's brief in opposition to the first petition for a writ of certiorari in this case (No. 711, O.T. 1960, pp. 3-6).

2. In January 1958, after this Court's decision in *Rowoldt v. Perfetto*, 355 U.S. 115 (decided December 9, 1957), the petitioner moved the Board of Immigration Appeals to reconsider the order of deportation in the light of that decision, or to reopen the proceedings to enable petitioner to offer testimony. The Board, although concluding that on the existing record *Rowoldt* did not govern the case, ordered the hearing reopened to permit petitioner to present evidence. However, petitioner did not testify or present evidence at the reopened hearing. Instead, he simply offered a statement by his counsel that the existing record did not establish a "meaningful" association in the Communist Party within the meaning of the *Rowoldt* decision. The hearing officer and, on appeal, the Board of Immigration Appeals found that the record, upon which petitioner was thus willing to rest, did establish such meaningful membership.

3. On May 22, 1959, petitioner sought judicial review of the order of deportation in the United States District Court for the District of Columbia, claiming that the record did not establish meaningful membership. The district court sustained the order of deportation; the court of appeals affirmed, 286 F. 2d 824; and this Court denied a petition for a writ of certiorari, 365 U.S. 871.

Petitioner's principal challenge in that proceeding, was, in the words of the opinion of the court of appeals, that "Rowoldt established a concept of 'meaningful association' which requires the Government to show something more than mere membership in the Communist Party before a deportation order can

validly be issued" (286 F. 2d at 827, Pet. App. 7a). This contention the court of appeals rejected. Its opinion quoted the statement in *Galvan* v. *Press*, 347 U.S. 522, 528, that "support, or even demonstrated knowledge, of the Communist Party's advocacy of violence was not intended to be a prerequisite to deportation" (286 F. 2d at 827, Pet. App. 8a). The court went on to state that it interpreted the statute as applying "to membership in the organization a presumption of espousal of the doctrines of the organization", which in the case of the Communist Party the Congress had found to include advocacy of violent overthrow, and that it read *Rowoldt* as "making that presumption rebuttable" (286 F. 2d at 828, Pet. App. 9a). The Court further pointed out that the Board of Immigration Appeals had drawn no inference from petitioner's silence, and that it therefore found no occasion, under the circumstances, to decide whether such an inference could be drawn (286 F. 2d at 828, Pet. App. 10a).

B. The present proceedings.

1. On May 4, 1961, following the denial of the petition for a writ of certiorari, petitioner again applied to the Board of Immigration Appeals for leave to reopen the proceedings so that he could testify that he never personally advocated the overthrow of the government by force and violence and that he had no knowledge that the Communist Party advocated violent overthrow. He contended, in essence, that this issue of personal advocacy was interjected into the case by the court of appeals and that, until the opinion of the court of appeals, neither he nor the

government had considered that lack of personal advocacy was relevant to the issue of deportability (1 R. 22-26).[2]

2. The Board of Immigration Appeals refused to reopen the proceedings for a second time (1 R. 16-20). It ruled that, in the light of the decision in *Galvan* v. *Press*, *supra*, rejecting a claim by an alien that he was not aware of the Party's true purpose or program, "an inquiry into whether an alien personally advocated violence is not material in a deportation proceeding unless it is part of an effort by the alien to show that his membership was of a nature described in *Galvan* as accidental, artificial, or unconsciously in appearance only" (1 R. 19). The Board further rejected the argument that the test of membership laid down in relation to criminal prosecutions under the Smith Act in *Scales* v. *United States*, 367 U.S. 203, applies to deportation proceedings (1 R 19-20). The Board concluded that, "there is uncontradicted testimony to show that a voluntary meaningful membership existed;" that, at the reopened hearing, petitioner had "been given an opportunity to show that his membership was nominal" but refused to present evidence on this issue; and that there was "no reason to believe his membership was nominal" (1 R 20).

3. Petitioner thereupon instituted in the district court a second action for judicial review and sought a temporary restraining order and preliminary injunc-

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[2] "R" designates the two-volume record now before the Court.

tion (1 R 4-8). On August 14, 1961, the district court denied a preliminary injunction, with findings of fact and conclusions of law (1 R 38-42; 2R 48). On application to the court of appeals for a stay of deportation, that court denied a stay and affirmed the judgment of the district court (Pet. App. A).[*]

ARGUMENT

Although petitioner now admits (Pet. 10) that, under the decisions of this Court, deportability for membership in the Communist Party "need not indicate the alien's personal commitment to violent doctrine," the attempt to show lack of such personal commitment was the basis of his motion to the Board of Immigration Appeals to reopen the deportation proceedings. Thus, by his own admission, denial of the motion to reopen was proper. Whether he was or was not justified in thinking that the prior opinion of the Court of Appeals made that issue material is irrelevant; the fact is that the Board of Immigration Appeals acted correctly under the controlling decisions of this Court.

Beyond that, petitioner is merely attempting to reargue what he argued before—that the evidence of his membership in the party was not sufficient to show meaningful membership within this Court's holding in *Rowoldt* v. *Perfetto*, 355 U.S. 115. His argument has no more merit now than it had then. There was

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[*] On October 25, 1961, the district court, after oral argument, granted the respondent's motion for summary judgment.

evidence from independent sources that petitioner was an active, dues paying, voluntary member of the Communist Party. Although given full opportunity to prove that his membership was merely nominal, or that as in *Rowoldt* it was not meaningful because it was motivated by other than political considerations, petitioner declined to offer evidence which would bring this case within the framework of *Rowoldt*.

Manifestly, the test of membership for the purposes of criminal prosecution under the Smith Act, as laid down in *Scales* v. *United States*, 367 U.S. 203, is not the same as for deportation under the Immigration and Nationality Act of 1952. The opinions of this Court have made it clear that, for the purposes of deportation, membership in the Communist Party is established where the evidence reveals that "the alien joined the Party, aware that he was joining an organization known as the Communist Party which operates as a distinct and active political organization, and that he did so of his own free will," *Galvan* v. *Press*, 347 U.S. 522, 528-529. The decisions since *Rowoldt* have recognized that that case did not change the basic standard adopted in *Galvan*. See *Niukkanen* v. *McAlexander*, 362 U.S. 390; *Schleich* v. *Butterfield*, 252 F. 2d 191 (C.A. 6), certiorari denied, 358 U.S. 814.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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